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Supreme Court of the United States

OCTOBER TERM, 1966

No. 498

SAMUEL MOSLEY,
Respondent,

—against—

CIA. MAR. ADRA S.A.,
Respondent,

—against—

LIPSETT STEEL PRODUCTS, INC.,
Petitioner.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF RESPONDENT CIA. MAR. ADRA S.A., IN OPPOSITION

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Opinions Below

The memorandum opinion of the District Court (App. B. of Petition) is not reported. The opinion of the Court of Appeals for the Second Circuit, and the dissenting opinion (App. A. of Petition) are reported at 362 F.2d 118.

Jurisdiction

It is not disputed that there is jurisdiction under 28 U.S.C. 1254(1). However, under the facts of this case and the applicable law, there are no valid reasons for the granting of a writ as prescribed by Rule 19 of the Rules of this Court.

Statement

This litigation concerns an accident to a longshoreman which was sustained during the course of a loading operation which was being conducted aboard respondent's vessel by petitioner, the injured longshoreman's employer. The cargo being loaded was loose scrap metal of varying sizes and shapes. The loading was conducted by dropping the scrap metal into a semi circular steel chute which was suspended on an incline from the main deck into the hatch opening. The scrap was caused by gravity to slide down the chute and off onto the deck in the particular section of the hatch toward which the lower part of the chute was directed.

It is undisputed that the chute, which was some 35 to 40 feet in length, and wider at the top than at the bottom, was furnished by petitioner; that petitioner by its employees including the injured longshoreman, was conducting the loading operation; that the petitioner's employees had rigged the chute prior to the accident and that:

> "According to the proof herein, no defect or unfitness in the hull, gear, machinery, or appurtenances of the ship directly visited harm on the plaintiff longshoreman. * * *" (Pet. p. 6)

It is further undisputed that petitioner controlled all the relevant aspects of the loading. Ship's officers went into the hatch occasionally only in order "to see that the ship was trimmed properly", to protect against damage and observe while "a position run"

was made when the position of the chute was changed. (Pet. p. 7). It is also not disputed that on the day previous to the accident petitioner loaded scrap metal into the hatch square to such a height that it cut off some of the natural light in the wings of the hatch where the stowing was being done on the day of the accident.

The accident in question occurred after loading of the scrap metal had gone on for some two hours in the 'tween deck of the #5 hatch of the SS TURMOIL. Shortly before the accident, some scrap metal which appeared to be the rear end of an automobile became jammed in the chute. The injured longshoreman who had been in the 'tween deck during the entire time that day and whose duty it was to see that the loading was done properly and to dislodge any scrap which might become trapped in the chute, decided to walk over to the chute and investigate the cause of the jamming and dislodge the trapped scrap metal. He picked up a piece of scrap metal which the longshoreman had fashioned into a hook and proceeded to the chute, walking over scrap metal which had fallen on the deck during the course of the loading operation. When he reached the chute, he placed the improvised hook around a part of the automobile rear end and commenced to pull in an attempt to dislodge the automobile rear end by pulling it over the side of the chute. As he continued to pull, his feet slipped on the scrap metal on which he had positioned himself and he fell.

The injured longshoreman sued the shipowner for damages claming negligence and breach of warranty of seaworthiness. The first trial resulted in a jury

verdict for the plaintiff on unseaworthiness and a jury verdict awarding the respondent-shipowner indemnity against the petitioner. The claim based on negligence was dismissed.

The judgment in plaintiff's favor was reversed by the Court of Appeals and the case remanded for a new trial. (314 F.2d 223). Certiorari was denied (375 U.S. 829).

On retrial, the case against the shipowner was submitted to the jury only on unseaworthiness. The jury returned a verdict in plaintiff's favor against the respondent-shipowner but denied indemnity to the shipowner against petitioner-stevedore.

Following the rendition of the jury verdict, respondent made timely application for judgment notwithstanding the jury verdict and the trial judge granted the motion. In granting judgment notwithstanding the verdict, the District Court upheld the respondent-shipowner's contentions that it was entitled to indemnity as a matter of law, stating:

> "Defendant's third contention is that it is entitled to indemnity as a matter of law. With this contention, we wholly agree. The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another. Mortensen v. A/B Glittre, 348 F.2d 383, 385 (2d Cir.1965); Albanese v. M.V. Nedorl, Amerik Stoomv, Maata., 346 F.2d 481, 484 (2d Cir.), rev'd on other grounds, 34 U.S.L. Week 3217 (Dec. 13, 1965). Here, there

> is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore and that the verdict in its favor is against the weight of the evidence. Even if we assume that the absence of lighting was the only unseaworthiness and that this condition was in its inception wholly attributable to the owner's failure to provide internal lights, the stevedore could and should have corrected it. There was uncontradicted evidence that electrical outlets were installed in the hold where plaintiff was working and that, in another hold on an earlier day, the stevedore had made use of such an outlet to provide artificial illumination. In this regard, plaintiff's knowledge of inadequate lighting is imputable to his employer, third-party defendant. Mortensen v. A/S Glittre, supra. at 385."

The Court of Appeals affirmed the judgment of the District Court, stating:

> "On the merits of the n.o.v. motion, the trial judge ruled that 'any seaworthy condition obtaining in the 'tween deck area was created by the stevedore. . . .' A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See Mortensen v. A/S Glittre, 348 F.2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service. See, e.g., Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 318-24 (1964);

Crumady v. The J. H. Fisser, 358 U.S. 423, 428-29 (1950); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1956)."

The dissenting opinion of Judge Friendly was directed only to the appeal from the judgment awarded to plaintiff against the respondent-shipowner. It pointed out that the charge to the jury on unseaworthiness on the second trial violated the same rule which required reversal of the judgment entered in favor of the plaintiff in the first trial. It, however, did not deal with the question of indemnity.

Argument

Petitioner's insistance that the granting of judgment notwithstanding the verdict on the indemnity claim violated the Seventh Amendment does not transform this case into one warranting review by this Court on certiorari. Of the several issues sought to be raised, petitioner overlooks the fact that the judgment on indemnity was correct as a matter of law and no amount of strained semantics can excuse petitioner's failure to load and stow the cargo properly and safely and its failure to furnish and properly use needed equipment.

This case does not actually involve a violation of the right to a jury trial guaranteed by the Seventh Amendment to the Federal Constitution nor is a determination of any question here involved necessary in order to define the rights and duties of the Trial Judge in a jury trial or the requirements of Rule 50 (a) and (b) of the Federal Rules of Civil Procedure or the obliga-

tions of a shipowner and a stevedore under their respective warranties.

To focus attention on precisely what is offered as an issue for Supreme Court determination with respect to the third-party indemnity claim, it may be pointed out that the petitioner concedes that "According to the proof herein, no defect or unfitness in the hull, gear, machinery, or appurtenances of the ship directly visited harm on the plaintiff longshoreman" (Pet. p. 6), and it is undisputed that petitioner "furnished and rigged the chute, and controlled all other relevant aspects of the loading", (App. A. p. 25-26).

Petitioner nonetheless urges that it was error for the Trial Judge to set aside the jury verdict on indemnity and grant judgment notwithstanding the verdict because (1) the jury could have concluded that the scrap metal on which the plaintiff longshoreman was standing when he fell "was not an unseaworthy condition 'created by the stevedore' "; (2) that ship's personnel by virtue of their presence "to see that the ship was trimmed properly", and to protect against damage to the ship and during position runs after the chute was placed in position were constantly supervising the loading; and (3) that the motion for a directed verdict at the close of all the evidence was not directed against petitioner and that, if it was, it was defective in that it did not state the specific grounds therefor.

The requirement that the stevedore load cargo all over the deck does not absolve the petitioner of its well defined duty to stow the cargo safely and properly. The law does not recognize any distinction between fully loading a ship and loading it partially. Com-

petency and safety of stowage are inescapable elements of the service undertaken whether the load is to be partial or total.

The presence of ship's officers during the loading operation or their failure to discover or correct the stevedore's failure to stow the cargo properly is no bar to indemnity. The admitted reason for the presence of ship's personnel disposes of petitioner's tenuous argument that they were continually supervising the loading operation. In any event only such conduct of the shipowner as prevents or seriously handicaps the stevedore in his ability to do a workmanlike job precludes indemnity and there was no claim let alone evidence of any such conduct here.

The requirement that a motion for a directed verdict be made in order to authorize the Trial Judge to grant judgment n.o.v. obviously was met. Petitioner did not dispute this even though it was expressly pointed out to the District Court in the written memorandum in support of the motion for judgment notwithstanding the verdict.

On the facts of this case, the decision of the District Court was manifestly correct. There is no asserted conflict of decision nor in the light of the purpose of the Federal Rules of Civil Procedure is any other result proper. Manifestly there is no important question of Federal Law requiring decision by this Court.

In view of respondent, Cia. Mar. Adra's position on its appeal to the Court of Appeals on the jury verdict for the plaintiff longshoreman and the state of the law, respondent-shipowner does not disagree that the

charge to the jury on unseaworthiness was improper. It disagrees, however, that this affords a basis for a denial of indemnity as petitioner did not raise this issue on the appeal to the Court of Appeals nor join in the appeal of respondent-shipowner.

Petitioner is filing a petition for a writ of certiorari on the question of the propriety of the Court's charge on unseaworthiness with the prayer that it be granted in the event certiorari is granted in this case, No. 498.

I.

The Decision Below Is Clearly Correct

Following trial, respondent, Cia. Mar. Adra, made a timely motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The District Court concluded that respondent, Cia. Mar. Adra, was entitled to indemnity as a matter of law because "The law is clear that a stevedore is liable over if he himself created the unseaworthy condition, or if the performance of a workmanlike job called for the elimination of a known risk created by another * * *." (App. B. p. 30). While the District Court did indicate that it could not state on what ground the jury found the vessel unseaworthy, there was no room for any doubt that the plaintiff's accident resulted from the petitioner's breach of its warranty of workmanlike service. The Trial Judge said: "Here, there is no question but that any unseaworthy condition obtaining in the tween deck area was created by the stevedore * * *." (App. B. p. 30), and accordingly granted the motion for judgment notwithstanding the verdict.

Petitioner does not appear to question the validity of this finding as it concedes that "According to the proof herein, no defect or unfitness in the hull, gear, machinery or appurtenances of the ship directly visited harm on the plaintiff longshoreman". (Pet. p. 6).

Petitioner's basic contention seems to be that because the Trial Judge added the clause "and that the verdict in its favor is against the weight of the evidence" the granting of the motion for judgment notwithstanding the verdict must have been based on the Court's weighing the evidence and not because the verdict was contrary to law.

At the same time, the Trial Court had before it a motion in the alternative for a new trial. There is therefore the distinct possibility that the Judge's thinking on the weight of the evidence was directed to the alternative motion for a new trial. Construing the findings of the Trial Court in a most favorable light to petitioner, the granting of the motion for judgment notwithstanding the verdict was based on mutually exclusive grounds. This, however, does not constitute reversible error because: "[T]he rule is well settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason". *Helvering* v. *Gowran,* (1937) 302 U.S. 238, 245.

The decision below was correct and the Court of Appeals, in affirming, was guided by this rule. After noting that on the merits of the n.o.v. motion, the Trial Court ruled that "any unseaworthy condition obtaining in the 'tween deck area was created by the stevedore * * *", the Court of Appeals expressly held:

> "A stevedore company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See Mortensen v. A/S Glittre, 348 F.2d 383, 385 (2d Cir. 1965). Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for breach of its warranty of workmanlike service. See, e.g., Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 318-24 (1964); Crumady v. The J.H. Fisser, 358 U.S. 423, 428-29 (1950); Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124, 133-34 (1956)." (App. A pp. 25-26)

Petitioner's contention that the granting of judgment n.o.v. was contrary to the Seventh Amendment because the jury could have found that the scrap on which plaintiff slipped "was not an unseaworthy condition created by the stevedore" (Pet. p. 10), is mere semantics and clearly without merit.

Petitioner's position is in absolute conflict with the doctrine of warranty of workmanlike service. The law is well settled that the agreement to load a vessel obligates the stevedore to stow the cargo safely and properly, as competency and safety of stowage are inescapable elements of the service undertaken. *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, (1955) 350 U.S. 124, 133. A stevedore is liable for indemnity not only if it creates an unseaworthy condition but also if it fails to eliminate an unseaworthy condition created by another, including the shipowner. *Mortensen* v. *A/S Glittre,* 2 Cir., 1965, 348 F.2d 383, 385. The

shipowner relies on the competency of the stevedore company and the stevedore is in a far better position than the shipowner to avoid the accident, *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 323. Under such circumstances a Trial Judge has not only the right but has the duty to direct a verdict where, as in the instant case, the facts are undisputed, the evidence is conclusive and the verdict is contrary to law. *Herron* v. *Southern Pacific Company,* (1931) 283 U.S. 91, 95-96. The decision below was unquestionably warranted by the facts of this case and the applicable law.

Turning to the subject of the motion for a directed verdict, it clearly preserved the right of the shipowner to make a motion for judgment n.o.v. and thus confer jurisdiction on the Trial Court to rule on that motion. As the Court of Appeals pointed out, all, including petitioner, accepted the motion for a directed verdict as covering the indemnity issue. Petitioner overlooks the fact that judgments are not to be set aside because there may be error in rulings unless it is clearly prejudicial. The burden to show such prejudice rests with petitioner and petitioner failed to carry this burden. Rule 61 F.R.C.P., *Palmer* v. *Hoffman,* 1943, 318 U.S. 109, 116. A judgment will not be reversed for mere technical errors so that it can be retried to reach the same result. It is well settled that it is not the purpose of the Federal Rules of Civil Procedure to permit a party to avoid a disposition of a case on its merits on the basis of mere technicalities. In *Foman* v. *Davis*, 1962, 371 U.S. 178, 181, this Court said:

"It is too late in the day and contrary to the

> spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. * * * Rules themselves provide that they are to be construed 'to secure the just, speedy, and inexpensive determination of every action.' Rule 1"

The Court of Appeals so applied that spirit of the Federal Rules when it said:

> "* * *, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to 'secure the just, speedy and inexpensive determination of every action.'" (App. A. 25)

The Trial Court's remark in colloquy with shipowner's counsel, after all the evidence was in that "All right, it is your case, not mine. If you haven't enough it is going to be your tough luck." (Pet. p. 8) was not directed to the evidence. As this colloquy shows, this remark resulted from an erroneous concept of law that indemnity was a matter of contract. The Court conceded that the shipowner had established "that the stevedore was on board and performed the work." Nonetheless, the Trial Court specifically asked: "It (indemnity) is a matter of contract, isnt't it?" (R. 352) When counsel sought to show that under the law indemnity was not a matter of contract and that the presence of the stevedore on board performing the work was all that was necessary, the Court said: "All right, it is your case, not mine. . . .". The law is well settled that indemnity is not dependent on proof of contract but is measured by the relationship which

brings it into play. *Crumady* v. *The Joachim Hendrick Fisser,* 358 U.S. 423, 428-429; *Waterman S.S. Corp.* v. *Dugan & McNamara,* 364 U.S. 421, 423-425; *Italia Societa* v. *Oregon Stevedoring Co.,* 376 U.S. 315. Furthermore, petitioner's answer expressly admitted that petitioner had contracted to load the ship with iron (Pet. p. 7).

The right to indemnity is not defeated by the fact that ship's officers were present to see that the ship was trimmed properly, to protect against damage and observe while a position run was made after the placement of the chute had been changed. (Pet. p. 7) Merely stating the reason for the presence of the ship's officers disposes of petitioner's tenuous argument that the ship's officers were exercising a continuous and regular supervision and control over the loading. *Puddu* v. *Royal Netherlands S.S. Co.,* 2 Cir., 1962, 303 F.2d 752, 754, cert. den. 371 U.S. 840, reh. den. 371 U.S. 917. Petitioner, however, is not relieved of its obligations under the warranty of workmanlike service by the failure of ship's personnel to discover and correct defects in the stowage, *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.,* 1956, 350 U.S. 124, 134.

Insofar as the propriety of the charge on unseaworthiness is concerned, petitioner did not raise it in the Court of Appeals. Petitioner evidently was satisfied with the Trial Court's charge. Petitioner also did not join with respondent-shipowner in its appeal directed to that charge.

II.

There Is No Conflict of Decision

Petitioner asserts that judgment n.o.v. cannot be granted when the jury verdict is against the weight of the evidence but that a new trial may be granted citing several cases in support thereof.

Respondent does not dispute this principle of law and the fact that it must be applied in the proper circumstances. Where, as in the instant case, the facts are undisputed, conflicting inferences are absent and the evidence is conclusive the trial judge has the right and duty to direct a verdict, or to set aside the jury verdict if it is contrary to the evidence or the law. *Herron* v. *Southern Pacific Company,* 283 U.S. 91, 95-96. This is still the law, *New York, N.H. & H.R. Co.* v. *Hennigan,* 1960, 364 U.S. 441. In *Lavender* v. *Kurn,* 1946, 327 U.S. 645, this Court noted that only when there is an evidentiary basis for the jury's verdict that is there an invasion of the jury's function for a court to weigh the evidence.

The decision of this Court in *Atlantic & Gulf Stevedores* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, does not require a different result than that reached by the Court below in this case. While this Court pointed out that a court may not search for a view of the case which will make the jury's finding inconsistent, it emphasized at the outset that it reached the result in that case because each possible ground of liability to the original plaintiff did not involve a breach of the petitioner's warranty as a matter of law. It said at page 364:

"We cannot say that petitioner was liable as a matter of law * * *"

In the instant case, the converse was true. Petitioner had the duty to stow the cargo properly and safely and could not use the failure of the shipowner to discover and correct the defect in stowage as a bar to indemnity. *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124. If the chute which was furnished for the loading of the scrap was defective or unfit for the purpose for which it was intended, the shipowner was entitled to indemnity because it "defers to the qualifications of the stevedoring contractor in the selection and use of equipment and relies on the competency of the stevedore company". *Italia Societa* v. *Oregon Stevedoring Co.*, 1964, 376 U.S. 314, 323. The stevedore's obligation to perform its services with reasonable safety extends not only to stowage and handling of cargo but also to the use of equipment incidental thereto including defective equipment supplied by the shipowner. *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 375-376; *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563; *Crumady* v. *Joachim Hendrick Fisser*, 358 U.S. 423. It is a breach of warranty of workmanlike service to use a dangerous method of loading and unloading cargo. *Waterman S.S. Corp.* v. *Dugan & McNamara Inc.*, 364 U.S. 421, 423. It is also a breach of warranty of workmanlike service to permit work to go on though the risk is created by another. *Mortensen* v. *A/S Glittre*, 2 Cir., 1965, 348 F.2d 383, 385.

The question of what conduct on the part of the shipowner precludes recovery which petitioner says was raised in *Weyerhaeuser* v. *Nacirema Operating*

Co., 355 U.S. 563, 567 was defined in *Albanese* v. *N.V. Nederl, Amerik. Stoomv., Maats,* 346 F.2d 481, reversed on other grounds 382 U.S. 283.

There is no conflict with respect to the application of Rule 50 (a) and (b) of the Federal Rules of Civil Procedure. The Court of Appeals below followed the decision of this Court in *Foman* v. *Davis,* 1962, 371 U.S. 178 and its decision was in conformity with this Court's holding in *Palmer* v. *Hoffman,* 318 U.S. 109.

Obviously, no conflict of decision exists which requires review by this Court on certiorari. Whatever confusion there may be results from petitioner's attempt to substitute discarded principles for well settled law to facts which do not exist in this case.

III.

There Is No Important Question of Federal Law

Petitioner asserts that there is a compelling need for this court to define the law on certain questions which it says lurk in this case. Except for decisions dealing with the shipowner's warranty of seaworthiness, there is no showing that the state of the law is such that definition and clarification is necessary. Mere fear of petitioner that confusion or uncertainty may arise does not clothe a question, if one actually exists, with sufficient importance to warrant review.

It is suggested that lawyers and judges could point to this case to demonstrate how far a trial court may go in substituting its judgment of the facts for the

judgment of the jury. The short answer to this is that judgment n.o.v. was granted not on the basis of the reevaluation of facts but purely because the jury's verdict was contrary to the law. The Court of Appeals expressly affirmed for this reason. It said:

> "* * * Since Lipsett furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find that the stevedore company was liable for a breach of its warranty of workmanlike service." (App. A p. 25-26)

It is also suggested that this case might be pointed to as demonstrating that the requirements of the Common Law and of FRCP Rule 50 a & b involve provisions which may be dispensed with in the discretion of the court. The short answer is that the provisions were not dispensed with but there was compliance and the Court of Appeals so found. It said:

> "This motion, although somewhat ambiguous, preserved Cia Mar Adra's right to make an n.o.v. motion." (App. A p. 24)

Inherent in the Court's finding is the fact that petitioner's objection, at best, was a mere technicality and did not warrant reversal of the judgment because the decision of the trial judge was correct on the law. It said:

> "* * *, a motion such as that made by counsel should not be read narrowly, so as to penalize the client but rather should be read in light of the purpose of the Federal Rules to secure the just, speedy and inexpensive determination of every action." (App. A p. 25)

The decision below was in conformity with the holding of this court in *Foman* v. *Davis,* 371 U.S. 178, 181 that it is contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities.

It is further suggested that this case may be relied upon as demonstrating that the warranty of seaworthiness is not limited or defined by decisions of this court but is subject to unlimited enlargement by lower courts. While respondent shipowner believes that the charge to the jury was improper and contrary to the doctrine of the warranty of seaworthiness as defined by this Court and has filed a separate petition* seeking review should this petition be granted, the answer to petitioner's contention is that petitioner did not raise this question on its appeal to the Court of Appeals nor join with respondent shipowner in its appeal on this question.

Petitioner thus is not entitled to seek review on this basis nor challenge the indemnity award on the rather illogical argument that because petitioner believes that this charge to the jury was legally incorrect, petitioner is not liable for indemnity except when the shipowner is legally liable. Under such a concept a stevedore could just sit back until after the shipowner had exhausted all his remedies and then refuse indemnity on the ground that the basis on which the shipowner was held liable did not constitute "legal liability".

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* *Cia. Mar. Adra S.A.* v. *Samuel Mosley,* October 1966 Term No. 550.

Conclusion

For the following reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully Submitted

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